86 - 1361

No.

Supreme Court, U.S.
FILED
FEB 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

**October Term, 1986**

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ANDREA REYNOLDS,

*Petitioner,*

*v.*

MARTHA von BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Does the First Amendment permit a federal court to impose the burden of proof upon an author to demonstrate that it was her intention at the inception of the newsgathering process to disseminate information to the public?

2. Is an author of an unpublished manuscript about a newsworthy event written with the *bona fide* intent to publish entitled to have the District Court apply First Amendment balancing considerations before the District Court compels disclosure of the manuscript and source materials, regardless of whether her intention to disseminate the information was formed after the newsworthy event occurred?

## List of Parties

The parties to the proceedings below were petitioner Andrea Reynolds, respondent Martha von Bulow by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl, and defendant Claus von Bulow. Because Mr. von Bulow has no interest in the issues raised in this petition, he is not named as a party herein.

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Andrea Reynolds respectfully requests that writ of certiorari be issued to review a decision of the United States Court of Appeals for the Second Circuit, entered on February 10, 1987, which affirmed orders of production and contempt arising from petitioner's refusal to produce her unpublished manuscript about a newsworthy event and her source materials, even though she was willing to testify as a witness to her observations.

## Opinions Below

The opinion of the Court of Appeals for the Second Circuit (per Timbers, J., with Meskill, J. and Kearse, J. concurring) has not yet been reported and is reprinted in Appendix A hereto at 1a-24a.[1] The opinion of the United States District Court for the Southern District of New York dated October 14 has not been reported and is reprinted in Appendix A hereto at 30a-37a. The Confidentiality Order entered by the District Court on October 28, 1986, and the order of contempt which was issued by the District Court from the bench on November 18, 1986, are reprinted in Appendix A hereto at 28a-29a and at 25a-27a, respectively.

## Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit, from which review is sought, was entered on February 10, 1987. That decision affirmed the orders of production and contempt entered on October 14, October 28 and November 18, 1986 in the United States District Court for the Southern District of New York. No petition for rehearing was sought. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

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1. Citations to Appendix A to this petition are denoted by a lower-case "a" following the page number ("—a"). Citations to the joint appendix submitted to the Court of Appeals are denoted as "JA—."

## Constitutional Provision and Statutes Involved

**Constitution:**

United States Constitution, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Statutes:**

28 U.S.C. § 1332
18 U.S.C. § 1964
New York Civil Rights Law § 79-h
California Evidence Code § 1070
New Jersey Statutes Annotated § 2A:84A-21

Each of the above statutes is set forth in Appendix B to this Petition.

## Statement of the Case

### Introduction

This case presents the Court with the opportunity to decide whether federal courts may decline to balance the First Amendment interests of an author who writes about newsworthy events merely because she has not shown that she intended at the inception of the newsgathering process to disseminate news. This Court has never held that there is a class of authors which is not entitled to the protections of the First Amendment balancing test merely because they formed the intent to publish at a later time. The Second

Circuit, in a case which it described as presenting a question of "first impression," narrowly restricted entitlement to First Amendment protections to those who can sustain the burden of satisfying this newly created "intent-at-the-inception" test. The Second Circuit articulated no societal or constitutional purpose to be served by this new test. No precedent has been found for the new test and the test is at odds with principles enunciated by this Court as well as other federal courts. Even if the new test is constitutionally permissible, the Second Circuit failed properly to apply it in this case.

**Statement of Essential Facts**

The underlying complaint in this civil suit alleges that defendant Claus von Bulow put his wife Martha von Bulow into a coma by surreptitiously injecting her with drugs. Federal jurisdiction was alleged under 28 U.S.C. § 1332, 18 U.S.C. § 1964(c), and the doctrine of pendent jurisdiction. (JA 1-16). Mr. von Bulow had been acquitted in 1985 of these charges in a criminal prosecution in the State of Rhode Island following reversal by the Rhode Island Supreme Court of his conviction at the first trial.

On June 2, 1986, respondent subpoenaed Mrs. Reynolds to be a deposition witness and to bring with her notes, source materials and a manuscript of a book which she had written concerning the criminal prosecution of Mr. von Bulow. (JA 48-51). Mrs. Reynolds had become an intimate friend of Mr. von Bulow following his conviction at the first trial in 1982. She has no firsthand knowledge of the facts underlying the criminal charges, or the charges set forth in the complaint.

Believing strongly in Mr. von Bulow's innocence, Mrs. Reynolds endeavored to vindicate him in the court and in the press. Although she was never asked directly when she formed the intent to publish her experiences and observatons,[2] at her deposition, she testified that she did not want the public record to be established only by William Wright's book which was critical of Mr. von Bulow and that she had reached her decision "to write about the von Bulow affair as a reporter . . . once the William Wright book came out [in 1983]." (JA 288-89). Toward this end, while she attended the second criminal trial, Mrs. Reynolds took notes which "were designed to be the basis of [such a] story."[3] (JA 158-59). Mrs. Reynolds used those notes as source materials for her manuscript and submitted those notes together with other source materials to the District Court for *in camera* review.

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2. Respondent's inquiry at the deposition focused primarily on whether petitioner spoke to confidential sources (JA 178-378), and did not elicit, among other things, the existence of a March 11, 1984 letter agreement with Mr. von Bulow which conveys to petitioner exclusive rights regarding his story.

3. At oral argument in the District Court, while plaintiff was acting *pro se*, the following colloquy occurred regarding the notes Mrs. Reynolds made at the second criminal trial in anticipation of writing her manuscript:

> The Court: Did you take any notes, did you make any notes that were designed to —?
>
> Mrs. Reynolds: I gave them to you.
>
> The Court: But were designed to be the basis of any such story?
>
> Mrs. Reynolds: Yes. It is essentially the ones I gave you. I mean they don't mean very much probably to somebody who has not been at the trial, but it was my remarks as I was hearing testimony.

Not only did the Court of Appeals ignore this colloquy, but it misinterpreted Mrs. Reynolds' earlier characterization of her notes as "worthless doodles," (19a), when it was clear she meant they were worthless to anyone but herself.

Following Mr. von Bulow's conviction at his first trial, Mrs. Reynolds became an integral part of his defense team. She interviewed prospective witnesses and did investigative work which contributed to his acquittal at the second trial. In addition, Mrs. Reynolds pursued her objective to vindicate Mr. von Bulow in the press. At her deposition she testified that she interviewed between ten and twenty people who spoke with her in reliance on her promises of confidentiality made as a journalist. (JA 290; 336-38).

Mrs. Reynolds was solicited in early 1985 by the *New York Post* to cover the second criminal trial of Mr. von Bulow. She agreed to cover the trial for the *Post* in order to give the defendant's view of the trial as it progressed, and consequently she was issued a *New York Post* police press card. Mrs. Reynolds wrote several articles which were found to be suitable for publication. However, terms for payment could not be agreed upon, and the articles were not published. (JA 160; 252-70; 402-03).

After the trial, the *Post* and other news publishers expressed interest in serializing Mrs. Reynolds' work and she was asked to give her story for a screenplay. (JA 161; 268; 192-93; 235-41; 273; 387). As Mrs. Reynolds developed her materials for publication, she decided to write her manuscript in book form. In February 1986, a publishing contract was entered with Simon & Schuster for the proposed book, for which Mrs. Reynolds received a substantial advance. The manuscript, which is 170,000 words long, has yet to be edited for content, libel and stylistic purposes and to assure that promised confidences will be respected. (JA 222-23; 166; 233-43).

**Procedural Background**

Mrs. Reynolds, acting *pro se*, did not comply with respondent's subpoena, and respondent obtained an order to show cause returnable on August 19, 1986. On August 6, 1986, Mrs. Reynolds produced to the District Court for *in camera* inspection materials she had gathered which had become source materials for her book, but retained possession of the manuscript. (JA 107-09; 156-57; 269).

At oral argument on August 19, the District Court stated that "it is highly unlikely that . . . any materials that you would turn over would be of much help to them [respondent]." (JA 157). Nevertheless, the District Court acknowledged that Mrs. Reynolds might have a valid claim to a journalist privilege and ordered her deposition on that issue. (JA 164; 171-72).

In its opinion dated October 14, 1986, the District Court found that Mrs. Reynolds was not a "journalist" for purposes of invoking the privilege. (32a). The District Court found that an article she claimed to have written for the German weekly newsmagazine *Stern* was published under her former husband's name, and that the *Post* had never published any of her articles. (35a). Without further discussion, the District Court wrote:

> Based on these facts, this Court is unable to conclude that Reynolds was engaged in any meaningful way in the gathering and dissemination of news while she attended von Bulow's criminal trial. Further she has not demonstrated that the notes and book manuscript sought by plaintiffs are related to any purported journalistic activities whether for *Stern* magazine, the New

> York Post or any other publication other than a possible book of her own.

(36a). The District Court went on to hold that even though Mrs. Reynolds had attended the trials and had planned to author a book, she could not invoke the journalist privilege because she was not a "professional journalist" or "newscaster." (36a). The District Court directed the parties to submit a stipulation of confidentiality to protect the commercial viability of the book. On October 28, the District Court filed a Confidentiality Order essentially in the form submitted by respondent. (37a).

Following the District Court's opinion, counsel appeared for the first time on behalf of petitioner. A series of legal procedures ensued so that petitioner could raise the journalist privilege as to both her manuscript and her source materials in a single appeal.[4] Ultimately, on November 18, the District Court held Mrs. Reynolds in contempt and im-

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4. Counsel moved to certify the order compelling her to produce the manuscript and to supplement the record regarding the source materials. Those motions were also denied. (JA 453-94).

On November 13, petitioner filed a Notice of Appeal, appealing the October 14 order of the District Court to produce the *in camera* documents to respondent. (JA 495-96). The Court of Appeals ordered an expedited appeal and respondent agreed to a stay pending the outcome of the appeal.

To avoid the prosecution of two appeals, Mrs. Reynolds' counsel applied to the District Court to return the *in camera* documents; the request was refused. Instead, the District Court *sua sponte* held Mrs. Reynolds in contempt and imposed a fine of $500 a day, thereby enabling Mrs. Reynolds simultaneously to appeal the orders of production and contempt. The District Court stayed imposition of the fine and production of the *in camera* documents pending a final determination by the Court of Appeals. (26a).

On November 20, Mrs. Reynolds appealed the Confidentiality Order and the order of contempt. (JA 501-04). On November 21, the Court of Appeals consolidated all three appeals. (JA 505). The Court of Appeals heard oral argument on December 19.

posed a fine of $500 a day and stayed its order pending the appeal.

On February 10, 1987, the Court of Appeals rendered a decision affirming the orders of the District Court and staying the mandate for ten days "to enable petitioner, if she is so advised, to apply to the Supreme Court for a further stay of the issuance of the mandate pending the filing of a petition for a writ of certiorari." (24a).

**The Decision Below**

The Court of Appeals held that an "individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process." (24a). According to the Second Circuit, "[t]his requires an intent-based factual inquiry to be made by the district court." (18a). However, the Second Circuit did not remand the case to the District Court for further factual inquiry into this new issue which had not been raised below. Moreover, the Second Circuit failed to consider the uncontradicted facts that Mrs. Reynolds had intended to "write about the von Bulow affair as a reporter" since 1983 and that she had taken notes at the second criminal trial for that purpose. (JA 288-89; 158-59). Nor did the Court of Appeals credit the District Court's findings that Mrs. Reynolds had attended the criminal trial and had planned to write a book about it, and that her notes and manuscript related to "a possible book of her own." (36a). Indeed, the Court of Appeals affirmed the District Court orders, finding that Mrs. Reynolds had failed to meet this newly imposed burden

to demonstrate an intent at the inception to disseminate information to the public.

The Court of Appeals characterized Mrs. Reynolds' position as a request "to construe expansively the qualified privilege accorded journalists not to reveal confidential sources and information in judicial proceedings." (11a). In fact, petitioner does not seek any expansive construction of the privilege. She asks nothing more than that the District Court undertake to balance her First Amendment interests against the respondent's casual interest in reviewing her unpublished manuscript. If a balancing were performed, it is clear that respondent would not be entitled to the subpoenaed documents. Respondent has made no showing that the subpoenaed documents are material, necessary or critical to the maintenance of the actions, or that the information sought is unavailable from other sources. Petitioner was denied the right to assert the First Amendment because the Court of Appeals determined that she was not worthy of such protection. The Court below reached that conclusion by creating a new test which is contrary to the principles articulated by this Court and by failing to consider the undisputed facts demonstrating that petitioner satisfied the test.

On February 12, 1987, petitioner moved the Court of Appeals for a further stay of the issuance of the mandate pending filing of a timely petition for certiorari. The Court of Appeals denied this motion on February 13.

**Application To The Supreme Court**

On February 19, 1987, petitioner applied to the Supreme Court for a further stay of the mandate.

# ARGUMENT

## I.

### The Second Circuit's Imposition Of A Burden Of Proof Upon An Author To Demonstrate An Intent To Disseminate News At The Inception Of The Newsgathering Process Contravenes The First Amendment, As Construed By This Court And Other Federal Courts, Which Imposes The Burden Upon The Party Seeking Disclosure To Show A Particularized Need For The Information And Its Unavailability From Other Sources

The Court of Appeals has for the first time imposed the burden upon an author to demonstrate her state of mind at the inception of the newsgathering process before allowing her to invoke the First Amendment. There is no precedent for the Court of Appeals' harsh new requirement. It is in conflict with the language of this Court and the decisions of other circuits. Indeed, the finding by the Court of Appeals on this record that petitioner had not met her burden of proof is the best evidence of the dangers posed by this newly created test.

According to Justice Powell's concurring opinion in *Herbert v. Lando*, 441 U.S. 153 (1979), district courts must undertake to balance the competing interests in any case "when a discovery demand *arguably* impinges on First Amendment rights." *Id.* at 179 (emphasis added). Given the undisputed facts that Mrs. Reynolds was issued a press card, had been solicited to write for the *New York Post*, had actually written articles which were found suitable for publication, had taken notes at the trial for the purpose of writ-

ing, had intended at the outset to vindicate Mr. von Bulow in the press as well as in court, and now has written a manuscript under contract with a *bona fide* publisher, there can be little doubt that her First Amendment rights are, at least, "arguably impinged" by respondent's attempt to compel disclosure. Accordingly, the Court of Appeals erred in failing to apply the First Amendment to her.

In *Philadelphia Newspapers, Inc. v. Hepps*, —— U.S. ——, 106 S. Ct. 1558 (1986), this Court held that a state may not shift the burden of proving truth to a media libel defendant in an action by a private figure. The Court reasoned:

> Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."

—— U.S. at ——, 106 S. Ct. at 1564 (citation omitted). Similarly, the Second Circuit's new rule requiring an author to show her state of mind at the time of the events will seriously operate to deter the flow of information to the public. Petitioner must be allowed to invoke the First Amendment without the harsh burden imposed by the Second Circuit. This case is unlike *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), because there are no fail-safe Due Process considerations sufficient to protect petitioner's interest in her unpublished manuscript and source materials. Only the First Amendment stands between her and the chilling intrusion occasioned by respondent's curiosity in what she has written.

Respondent's subpoena is no more than a fishing expedition on which respondent embarked "on the mere hope that some [relevant] material might turn up." *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). The burden properly should be respondent's—not petitioner's—when an author's First Amendment interests have at least arguably been impinged.

The newly imposed burden of proof also conflicts with the decisions of other federal courts which this Court has permitted to stand. Following this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), where, after balancing the competing concerns, the Court compelled journalists to testify to crimes they witnessed, the Second Circuit held that the public interest in refusing to disclose a confidential source in a civil case outweighed the private interest in compelled testimony. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 466 (1973). Subsequently, the Second Circuit adopted a balancing test incorporating stringent criteria which a party seeking disclosure must satisfy before a journalist's interests in confidentiality will be compelled to yield:

> disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

*In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982). In *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983), the Second Circuit described the burden imposed on parties seeking disclosure:

> This demanding burden [on persons seeking to compel disclosure] has been imposed by the courts to "reflect

> a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in a robust, unfettered debate over controversial matters, an interest which has always been the concern of the First Amendment . . . ."

These considerations have been adopted by other federal courts. *E.g., Zerilli v. Smith*, 656 F.2d 705, 712-14 (D.C. Cir. 1981); *United States v. Cuthbertson*, 630 F.2d 139, 146-48 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Riley v. City of Chester*, 612 F.2d 708, 716-18 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Carey v. Hume*, 492 F.2d 631, 636-39 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *United States v. Blanton*, 534 F. Supp. 295, 296-97 (S.D. Fla. 1982); *Los Angeles Memorial Coliseum v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981).

Petitioner has found no federal case which has ever imposed the burden on an author to demonstrate his intent to publish at the outset of the newsgathering process before the First Amendment may be applied. In any event, under the facts established here, petitioner should be entitled to the protection of the First Amendment.[5]

It should be underscored that in this case neither the District Court nor the Court of Appeals has suggested that the respondent could prevail under the First Amendment balancing test endorsed by this Court, if Mrs. Reynolds

5. In *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427, 436 (E.D. Mo. 1984), the court described the journalist's burden to be a "minimal *prima facie* showing" before shifting the burden to the party seeking disclosure.

were entitled to have it applied. Simply put, the materials sought are not highly relevant to respondent's case; even if the materials are remotely relevant, they have never been claimed to be necessary or critical to the maintenance of respondent's case. Certainly, the materials sought are available from other sources. (JA 224; 430-31). *Cf. In re Petroleum Products Antitrust Litigation*, 680 F.2d at 8-9. In this regard, Mrs. Reynolds remains willing to testify as a witness, but not to produce her manuscript or source materials. (JA 430).

Certiorari should be granted to review the imposition of the burden of proof on petitioner to demonstrate that it was her intention to disseminate information to the public when she participated in the newsworthy events.

## II.

### The Second Circuit's New Requirement That An Author Must Have The Intent To Disseminate News At The Inception Of The Newsgathering Process Contravenes The First Amendment As Construed By This Court And Poses The Substantial Danger Of Chilling Authors Of Non-Fiction Who Are Not Journalists By Trade

The Second Circuit has articulated a new test which strips away from an entire class of people who write news for publication the right to protect their unedited manuscripts prior to publication. The Court of Appeals held that unless an author can demonstrate her intention to disseminate news at the inception of the newsgathering process, the author has no First Amendment rights to resist compelled production of her unpublished manuscript.

Under this new test, the District Court need not consider First Amendment rights of the author to write and edit her manuscript free from the casual inquiry of a litigant who has made no showing of particularized need for the information in the manuscript or of the unavailability of that information from other sources. This decision runs afoul of the First Amendment principles enunciated by this Court. It poses the serious danger of chilling authors who are not journalists by trade from writing about their experiences and observations for fear that their unedited and unpublished writings can be disclosed by compulsion without regard to need. The decision below contravenes society's interest, rooted in the First Amendment, to encourage the writing and publication of firsthand accounts of newsworthy events which are available only from eyewitnesses and participants. Because of the importance of the question and conflicting authorities, there are compelling reasons for granting certiorari.

This case presents for the first time the important question of who may invoke the journalist "privilege"[6] under the First Amendment. In order to determine whether petitioner was entitled to assert the privilege, the Court of Appeals created a new test which restricts the class of people who are entitled to the protections of the journalist privilege:

> We hold that an individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate

6. The "privilege" is really nothing more than a right to have the District Court balance threatened First Amendment interests against the interests of a party seeking disclosure. *See Herbert v. Lando*, 441 U.S. 153 (1979).

> information to the public and that such intent existed at the inception of the newsgathering process.
>
> (24a).

It is not disputed that Mrs. Reynolds intended to disseminate the information to the public when she commenced writing her manuscript, or that the manuscript is newsworthy. Nor is it disputed that she was willing to testify as a witness to what she observed.[7] Mrs. Reynolds merely objected to producing the manuscript she had written for publication and the source materials used in writing the manuscript.

This Court has held that the First Amendment protects all stages of the press process and expressions of speech.[8] In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court struck an ordinance requiring the licensing of pamphleteers. The Court observed that the First Amendment reaches every sort of publication and every phase of dissemination:

> The ordinance cannot be saved because it relates to distribution and not to publication. "Liberty of circulating is as essential to that freedom as liberty of

7. Accordingly, this case does not involve the question of whether her value as a witness outweighs her rights to assert a privilege with respect to what she wrote. *E.g., Branzburg v. Hayes*, 408 U.S. 665 (1972). Indeed, the District Court did not reach the balancing issue, holding that she was not entitled to assert any journalist privilege in the first place.

8. In *Branzburg v. Hayes*, 408 U.S. at 705, this Court recognized the panoply of persons who comprise the press:

> The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.

> publishing; indeed, without the circulation, the publication would be of little value."

303 U.S. at 452 (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1878)). It does not argue too much to say that without editing, writing would be of little value; and, without writing, newsgathering would be of little value. Indeed, this Court has expressly stated that it would be impermissible to require those engaged in the editorial process to subject themselves to scrutiny absent a compelling showing of need. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court compelled disclosure of editorial decisions made respecting an allegedly defamatory publication because the editorial decisions went to the heart of plaintiff's claim and the issue of actual malice. However, the Court was careful to explain:

> This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed.

441 U.S. at 174. Other courts, too, have acknowledged that the First Amendment protections have a broad scope which reach every phase of getting the story to the public:

> The ability of a reporter or news publication to gather information in confidence and to sift and edit privately without being subject to governmental or court orders of disclosure is an important facet of the ability of the press to learn and publish news. It should not be overridden without compelling reason.

*In re Forbes Magazine*, 494 F. Supp. 780, 782 (S.D.N.Y. 1980). Indeed, the District Court in this case observed

that as of 1980, twenty-six states had enacted shield laws,[9] several of which expressly provide that all the phases of the press are covered. (34a). For example, the New York shield law defines a professional journalist entitled to invoke the privilege as any individual writing for gain "engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news" for a news medium. N.Y. CIVIL RIGHTS LAW § 79-h(a)(6) (McKinney Supp. 1987).[10]

Under the Court of Appeals' test, however, authors who form the intention to be part of the press process at the outset have rights superior to authors who decide to publish their experiences only after witnessing the events in question. There is no apparent justification for this distinction, and the Court of Appeals articulates none.

In fact, this intent-at-the-inception test offends the public policy served by the First Amendment, namely, to encourage the likelihood that the newsworthy story—whatever it may be—will be told to the public. *See* A. BICKEL, THE MORALITY OF CONSENT at 85 (1975) ("The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press in behalf of the public."). To paraphrase a leading federal case involving the extension of the journalist privilege to non-confidential

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9. *See* Comment, *The Newsman's Qualified Privilege: An Analytical Approach*, 16 CAL W.L. REV. 331, 368 n.284 (1980).

10. California's shield law similarly extends to "[a] publisher, editor, reporter or other person" associated with a press medium. CAL. EVID. CODE § 1070 (West Supp. 1987); *see also* N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1986-1987) ("a person . . . engaged in . . . news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news").

sources, the time at which an author first intends to disseminate newsworthy information is "utterly irrelevant to the 'chilling effect' . . . on the flow of information to . . . the public." *Loadholtz v. Fields*, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975). Simply put, a casual inquiry at any stage of the press process creates the substantial risk that First Amendment interests will be impinged.

As Justice Powell wrote in his concurring opinion in *Herbert v. Lando*, 441 U.S. 153, 179-80 (1979) (citations omitted):

> Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the important public interest in a free flow of news and commentary. . . . On the other hand, there is also a significant public interest in according to civil litigants discovery of such matters as may be genuinely relevant to their lawsuit. Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law.

By its decision, the Court of Appeals has held that district courts in the Second Circuit may no longer undertake this balancing test unless an author intended to disseminate news at the inception of the newsgathering process. Thus, if an author formed the intent to disseminate her story only midway through the events which she witnessed, or

after they occurred, no balancing test is to be undertaken. In the Second Circuit, the rule is now that a party may subpoena an author's unedited, unpublished manuscript without any initial showing of need or relevance.

This new test leads to the anomalous result that a professional journalist is afforded the right not to disclose a confidential source who participated in an event, but the confidential source himself is not permitted to withhold an unedited manuscript which he subsequently writes for publication, except in the unlikely event that he had an intent before the events occurred to publish the story. Even though the First Amendment interest in getting the story told is the same in both cases, under the Court of Appeals' test, the story is not likely to be told directly by the participant because he will be deterred from writing about his experiences.[11] The Court of Appeals did not address this issue, writing only that a "person who gathers information for personal reasons . . . will not be deterred from undertaking his search" if disclosure is compelled. (14a).

While the Court's reasoning is sound as far as it goes, it does not go very far. The Court of Appeals simply did

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11. The nature of the chilling effect in this case is analogous to the one described by the Seventh Circuit in the context of a claimed "academic" privilege:

> enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs.

*Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1276 (7th Cir. 1982). Here, in this inter-familial dispute involving allegations of attempted murder, Mrs. Reynolds has reason to fear that the Auerspergs, who are suing in the name of their mother, will contact Mrs. Reynolds' publisher prior to publication, as they did with respect to Alan Dershowitz's book prior to its publication by Random House. (JA 165-68; 431).

not consider the chilling effect on *writing* caused by compelled disclosure of an unedited manuscript. The Court of Appeals' test is likely to result in the further anomaly that a publisher of a book written by an eyewitness will be entitled to assert the privilege, because the publisher had the intent to disseminate at the inception, when it received the manuscript and entered the contract; however, the author himself will have no right to protect his work from the intrusive eyes of a curious and casual observer.

Certiorari should be granted to review the Court of Appeals' creation of the new test requiring an author to have an intent at the inception to disseminate news.

## Conclusion

For the foregoing reasons, petitioner respectfully requests that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: New York, New York
February 19, 1987

Respectfully submitted,

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# APPENDICES

## Appendix A

## Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 695, 698, 699—August Term, 1986

(Argued: December 19, 1986

Decided: February 10, 1987)

Docket Nos. 86-7962, 86-7982, 86-7984

MARTHA von BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

*Plaintiff-Appellee,*

— v. —

CLAUS von BULOW,

*Defendant,*

ANDREA REYNOLDS,

*Third Party Witness-Appellant.*

Before:

TIMBERS, MESKILL and KEARSE,

*Circuit Judges.*

Expedited consolidated appeals from civil contempt order and subordinate production orders entered in the Southern District of New York, John M. Walker, *District Judge*, after rejecting claims of a journalist's privilege or, alternatively, an attorney-client privilege (as a paralegal) by Andrea Reynolds, an "intimate friend" of Claus von Bulow.

All orders affirmed.

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John S. Siffert, New York, N.Y. (Patricia McDonagh, Sheila B. Rathbun, Jason G. Luchan, and Lankler Siffert & Wohl, New York, N.Y., on the brief), *for third party witness-appellant Andrea Reynolds.*

Frederic W. Parnon, New York, N.Y. (Ivan Kline, Melissa A. Cohen, Michael F. Armstrong, and Barrett Smith Schapiro Simon & Armstrong, New York, N.Y., on the brief), *for appellee Martha von Bulow.*

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TIMBERS, *Circuit Judge:*

The essential question presented on this appeal from a civil contempt order entered against a witness is whether the contemnor is entitled to claim a journalist's privilege. Under the circumstances of this case, we hold that she is not. Other subordinate questions are presented.

The appeal has its genesis in certain civil litigation commenced by Martha von Bulow by her two children as her

next friends (collectively referred to as "appellee") against her husband Claus von Bulow ("von Bulow").

The third party witness appellant Andrea Reynolds ("Reynolds") appeals from the contempt order against her announced from the bench on November 18, 1986 in the Southern District of New York, John M. Walker, *District Judge*.[1] The contempt order, being a final appealable order, brings up for review two prior production orders entered October 15 and October 28, which, standing alone, of course would not be appealable since they are interlocutory orders.

The October 15 order directed Reynolds to produce certain documents subpoenaed by appellee. Those documents consisted of investigative reports commissioned by Reynolds on the lifestyle of Martha von Bulow's children, notes taken by Reynolds while observing the criminal trial of von Bulow, and the manuscript to date of an unpublished book being written by Reynolds about the events surrounding the von Bulow prosecution. Although Reynolds submitted the investigative reports and the notes to the court in camera, she retained the manuscript. The court held that all of the documents were discoverable and ordered production of them after examining, and rejecting, Reynolds' claim that the documents were protected from discovery by the journalist's privilege. The court also rejected Reynolds' alternative claim that the documents were protected by the attorney-client privilege.

The October 28 order governed the confidentiality of the documents. The order sought to protect the commercial viability to Reynolds of the documents and, accordingly, limited disclosure of the documents to appellee, her

[1]All dates in this opinion are in 1986, unless otherwise indicated.

next friends and their attorneys for the sole purpose of litigating appellee's action against von Bulow.

The November 18 order held Reynolds in civil contempt of court for her continued refusal to produce the manuscript. The court ordered that Reynolds pay a fine of $500 per day, but stayed payment of the fine pending a determination by our Court of the validity of the contempt order. The court further ruled that it would retain possession of the in camera documents pending that determination.

On appeal, Reynolds argues that the First Amendment protects the subpoenaed documents and hence that she has the right to assert the journalist's privilege as a protective shield. In the alternative, Reynolds argues that she is entitled to assert an attorney-client privilege based upon her status as a "paralegal" for the defense team during the criminal prosecution of von Bulow. On these grounds, Reynolds contends that the district court erred in holding her in contempt. We disagree. We hold that Reynolds is not a member of the class entitled to assert the journalist's privilege. We also hold that an attorney-client privilege is unavailable to her.

We affirm the district court's orders of contempt, production, and confidentiality.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

The underlying complaint alleges that von Bulow put appellee into her current state of permanent coma by injecting her surreptitiously with insulin and other drugs. The complaint alleges one federal law claim based on the

Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. (1982) ("RICO") and nine state law claims based on pendent and diversity jurisdiction.

Reynolds is an intimate friend of von Bulow. She was his steady companion during the Rhode Island state criminal proceedings which resulted eventually in his acquittal after a second trial on charges of assault with intent to murder his wife. On May 28, 1986 attorneys for appellee, in preparation for the instant litigation, subpoenaed Reynolds to testify and to produce certain documents at her deposition. Among the documents subpoenaed was "any book being written" about the von Bulow matter.

Reynolds failed to respond to the subpoena. On July 25 the district court ordered appellee to proceed by order to show cause to require Reynolds to show why she should not be held in contempt for her failure to respond to the subpoena and to produce the subpoenaed documents. The order to show cause was signed by the district court on July 30. It was served on Reynolds who responded pro se in a letter to the district court dated August 6. In that letter Reynolds denied the existence of the documents which had been subpoenaed, with one exception. That exception was delineated by Reynolds as "the manuscript of my story of the von Bulow affair". This she declined to produce.

Along with the letter, Reynolds submitted to the court for in camera inspection two investigative reports she had commissioned on the lifestyles of Martha von Bulow's children, stating that she had ordered the reports because "[the children's] credibility was something I had to establish not only for the [von Bulow criminal] case, but also for my own peace of mind."

Reynolds also submitted to the court approximately 51 pages of handwritten notes, explaining that "[h]aving been barred from [the Rhode Island criminal] court [during the von Bulow trial], I watched the trial in one of the generator trucks, involved in satellite communication. During those long hours, I made some notes. (Worthless doodles, I think.)"

On August 19 the district court heard oral argument on the order to show cause. Reynolds appeared pro se. She argued that the production of the manuscript was protected by the evidentiary privilege accorded to journalists. The district court, indicating to Reynolds that it was "bending over backwards because you are not represented by an attorney right now", agreed to permit Reynolds to develop a record to support the claimed privilege by testifying at a deposition. The court urged Reynolds to reconsider her decision to proceed pro se. The court stated, "I think that does place you at a disadvantage in a proceeding like this."

Her deposition was taken on August 27. Reynolds again appeared pro se. She stated that she wished to claim the journalist's privilege along with "any other privilege that exists under the sun." To support her claim to a journalist's privilege, Reynolds produced a press card from Polish Radio and Television issued in 1979. She also asserted that she "was acting as a writer" for the German magazine *Stern*, that she had "drafted" an article about von Bulow that had appeared in *Stern*, and that she had supplied a German editor with a "long" article on von Bulow. Further, she stated that the *New York Post* had issued her a police/press pass for the von Bulow trial. She produced a letter from the former Metropolitan Editor of the *Post* which stated that he had solicited Reynolds to cover the

von Bulow trial for that newspaper. Finally, she produced a telex from a German publishing agency which indicated that Reynolds' "final work" would be serialized by that agency pursuant to an August 1985 agreement.

During the deposition, Reynolds stated that she had never published any writing under her own signature, that the negotiations with the *Post* had never come to fruition, that the manuscript was not prepared under contract, and that her relationship with the publisher of her proposed book "has nothing to do with my privileges as a journalist". Reynolds declined to make more specific her claim that she had worked as a "paralegal" on the defense team during the von Bulow trial. She also declined to discuss the rationale for her claim to a scholar's privilege, indicating that her understanding of the court's order was that her deposition was to be taken solely on the issue of the journalist's privilege.

A transcript of the deposition, along with subsequent correspondence from Reynolds and appellee's counsel, was submitted to the court. On October 15 the court filed a well reasoned opinion in which it denied Reynolds' claim of a journalist's privilege and ordered production of the in camera documents and the manuscript. The court held that, for protection under the journalist's privilege to be available to a witness, that witness must be involved actively in the gathering and dissemination of news. It held that Reynolds was not so involved. It stated that, although Reynolds claimed to have published an article in *Stern*, the *Stern* article in fact identified Reynolds' husband as the author. It observed also that the *Post* never had published anything written by Reynolds. Finally, the court concluded that, since Reynolds was not a member of the class of potential witnesses to whom the journalist's

privilege was available, it was not necessary for the court to perform the detailed analysis of competing considerations required by the First Amendment balancing test. *See In re Petroleum Products Antitrust Litigation,* 680 F.2d 5, 7-8 (2 Cir.), *cert. denied,* 459 U.S. 909 (1982).

The court then directed appellee and Reynolds to submit proposed orders which would govern the confidentiality of the documents to be produced. The court outlined for the parties what the order should contain. On October 20 counsel for appellee submitted a proposed confidentiality order to the court. On October 24 Reynolds submitted a letter in response. The letter was divided into two segments, one entitled "Reargument", the other entitled "Proposed Order". In the reargument segment, Reynolds again asserted her claim to an attorney-client privilege arising from her role as a paralegal during the von Bulow trial. In the segment which addressed the confidentiality order, Reynolds, although continuing to assert that no proposed order could protect her rights adequately, suggested alterations to appellee's proposal.

The court denied the attorney-client claim with a memorandum endorsement, stating that the claim was without substantial factual support. With one additional protective provision inserted, the court signed the confidentiality order as proposed by appellee. The order was entered on October 28.

On November 7, present counsel for Reynolds wrote to the court confirming their representation of Reynolds. At a hearing held on November 12, counsel for Reynolds made a motion to certify a part of the production order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982); to supplement the record; and for a stay of enforcement. The court declined to permit Reynolds to

supplement the record and refused to grant certification pursuant to § 1292(b), stating, "...frankly, I think she is toying with the court. I simply will not permit it. I have the highest respect for you [Reynold's counsel], but I think this eleventh-hour move on her part is reprehensible, frankly, and I am going to deny all the applications that you have made." The court, however, did give Reynolds one week to seek a stay from our Court pending appeal.

On November 19 a notice of appeal from the October 15 order of production was filed.

On November 18 the court sua sponte held Reynolds in contempt for failure to produce the documents and imposed a fine of $500 per day, the payment to be stayed pending appeal. The court denied requests by Reynolds to return the in camera documents to her, ruling that it would retain the documents pending a final determination by our Court.

On November 20 Reynolds filed notices of appeal from the confidentiality order and from the contempt order. On November 21, our Court consolidated the three appeals. Appellee agreed to a stay of the three orders pending appeal.

II.

Discovery in civil litigation pending in a federal court is governed by the Federal Rules of Civil Procedure. These Rules paint with a broad brush. Fed. R. Civ. P. 26(b)(1) provides in relevant part that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action...." (emphasis added). The principles by which a federal court determines whether material sought

is privileged are set forth in Fed. R. Evid. 501 which provides:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Before considering whether Reynolds is entitled to any privilege, we first must decide whether the privileges she seeks to invoke are governed by federal law or state law. The complaint in the instant action alleges a federal claim based on RICO and state law claims based on pendent and diversity jurisdiction. The evidence sought from Reynolds is relevant to both the federal and state claims. In such situations courts consistently have held that the asserted privileges are governed by the principles of federal law. *E.g., Wm. T. Thompson Co.* v. *General Nutrition Corp.*, 671 F.2d 100, 104 (3 Cir. 1982); *Memorial Hospital for McHenry County* v. *Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981). This approach is consistent with the legislative history of Rule 501. The Senate Report which accompanied Rule 501 stated that "[i]t is also intended that the Federal Law of privileges should be applied with respect to pendent State law claims when they arise in a

Federal question case." S. Rep. No. 1277, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7059 n.16. The instant case is a federal question case by virtue of the RICO claim; and pendent state law claims arise in the case. Accordingly, we hold that the federal law of privilege controls the question whether the privileges asserted by Reynolds should be recognized.

At the outset, we are mindful that testimonial exclusionary rules and privileges are not favored. "The Supreme Court has shown no enthusiasm for the creation of new constitutional privileges. . . ." *Herbert* v. *Lando*, 568 F.2d 974, 998 (2 Cir. 1977) (Meskill, J., dissenting), *rev'd*, 441 U.S. 153 (1979). This is because they contravene a fundamental principle of our jurisprudence that "the public . . . has a right to every man's evidence." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950). Indeed, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974) (rejecting absolute Presidential privilege). Here we are asked to construe expansively the qualified privilege accorded journalists not to reveal confidential sources and information in judicial proceedings.[2] Specifically, we must decide whether one who gathers information initially for a purpose other than traditional journalistic endeavors and who later decides to author a book using such information may then invoke the First Amendment to shield the production of the information and the manuscript.

This question is one of first impression at least in this

[2]For a scholarly analysis of the journalist's privilege as currently recognized by the federal courts, *see generally*, Note, *A Press Privilege for the Worst of Times*, 75 Geo. L.J. 245 (to be published Spring, 1987).

circuit. The question, moreover, does not appear to have been decided by any other court. In the light of "reason and experience", therefore, we turn to the First Amendment and to case law construing the journalist's privilege under that amendment. From these sources we shall attempt to glean the boundaries of the journalist's privilege as applied to this case.

We discern certain principles which we must use in determining whether, in the first instance, one is a member of the class entitled to claim the privilege. First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person's intent at the inception of the information-gathering process. Third, an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. Fourth, the relationship between the journalist and his source may be confidential or nonconfidential for purposes of the privilege. Fifth, unpublished resource material likewise may be protected.

A.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Supreme Court held that a journalist does not have an absolute privilege under the First Amendment to refuse to appear and testify before a grand jury to answer questions relevant to an investigation into the commission of crime. The case involved a story written by a reporter for the

Louisville Courier-Journal on the illegal manufacture of hashish. The reporter personally had witnessed the hashish production and was subpoenaed by a Kentucky grand jury to testify about his experience. Branzburg appeared before the grand jury, but, claiming a First Amendment privilege, refused to reveal the identities of the individuals producing the illegal substance. The Court rejected the claim of privilege, basing its decision on the traditional importance of grand juries and the strong public interest in effective criminal investigation. The Court recognized, however, that a qualified privilege may be proper in some circumstances because *newsgathering* was not without First Amendment protection. *Id.* at 707 (emphasis added).

In *Baker* v. *F & F Investment*, 470 F.2d 778 (2 Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), we declined to apply *Branzburg* in a civil setting. *Baker* was a civil rights action in which racial discrimination in the sale of housing in the City of Chicago was alleged. In the course of discovery proceedings, the plaintiffs deposed the editor of the Columbia Journalism Review, who had written an article ten years earlier on "blockbusting". That article, published by the *Saturday Evening Post*, had been based upon information furnished to the editor by an anonymous real estate agent who gave the information under an agreement of confidentiality. At his deposition the editor refused to disclose the identity of his confidential source. The plaintiffs moved to compel him to do so. The district court denied the motion. We affirmed. We held that the public interest in non-disclosure of a journalist's confidential sources outweighed the public and private interest in compelled testimony. Central to our analysis in *Baker* was our concern that "[t]he deterrent effect such disclosure is likely to have upon future 'undercover'

*investigative reporting* . . . threatens freedom of the press and the public's need to be informed". *Id.* at 782 (emphasis added). This rationale suggests that the critical question in determining if a person falls within the class of persons protected by the journalist's privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation. A person who gathers information for personal reasons, unrelated to dissemination of information to the public, will not be deterred from undertaking his search simply by rules which permit discovery of that information in a later civil proceeding. Our holding in *Baker* provides no basis for claiming a journalist's privilege by persons who do not begin their investigations with an intent to disseminate information to the public, since no First Amendment rights are implicated under such circumstances.

On rare occasions the journalist's privilege has been invoked successfully by persons who are not journalists in the traditional sense of that term. In *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), the court was called upon to determine whether a documentary film maker, a third-party witness, was protected by a privilege from revealing confidential sources in his deposition. The witness was a film maker who organized a production company for the purpose of making a film having to do with the events surrounding the death of Karen Silkwood. The defendants sought to depose the film maker and, in connection with his deposition, subpoenaed documents and writings in connection with the film maker's investigation. The film maker appeared for the deposition but, invoking his First Amendment privilege, refused to answer questions which called for the disclosure of information given to him under agreements of confidentiality.

The district court denied protective relief to the film maker. The Tenth Circuit first considered the effect on the validity of the journalist's privilege where the witness was not a regular newsman. It concluded that the fact that the film maker was not a salaried newspaper reporter did not, in and of itself, deprive him of the right to seek protective relief. The court therefore reversed the district court. The court reasoned that:

> "His mission in this case was to carry out *investigative reporting for use in the preparation of a documentary film.* He is shown to have spent considerable time and effort in obtaining facts and information of the subject of this lawsuit, but it cannot be disputed that *his intention,* at least, *was to make use of this in preparation of the film.*"

*Id.* at 436-37 (emphasis added). *See also Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975) (upholding assertion of privilege by chief executive officer of *The Medical Letter on Drugs and Therapeutics,* a technical journal with a circulation of 70,000 readers).

Other federal courts have held that the privilege can be invoked to shield disclosure of nonconfidential sources and nonconfidential information. *E.g., United States* v. *Blanton,* 534 F. Supp. 295, 296-97 (S.D. Fla. 1982), *aff'd,* 730 F.2d 1425 (11 Cir. 1984) (information sought was "*gathered, developed or received* by [reporter] in his professional *newsgathering* capacity" and nonconfidentiality of source of information was "irrelevant to chilling effect") (emphasis added); *Loadholtz* v. *Fields,* 389 F. Supp. 1299, 1300, 1303 (M.D. Fla. 1975) (regarding materials developed by reporter *in preparation of newspaper article,* nonconfidentiality of source was "utterly irrel-

evant to 'chilling effect' on flow of information to press and public").

Journalists who seek to guard information that has not been published likewise have been accorded the protective shroud. "Like the compelled disclosure of confidential sources, [the compelled production of a reporter's resource materials] may substantially undercut the public policy favoring the free flow of information to the public that is the foundation of the privilege." *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3 Cir. 1980), *cert. denied*, 454 U.S. 1056 (1981) (documents subpoenaed were resource materials pertaining to *preparation of CBS investigative report*). *See also United States* v. *Burke*, 700 F.2d 70, 76-78 (2 Cir.), *cert. denied*, 464 U.S. 816 (1983) (documents sought were *prepared* by reporter *in connection with news story*).

In examining the boundaries of the journalist's privilege, we may consider also the applicable state law, in this case New York's so-called "Shield Law", N.Y. Civ. Rights Law § 79-h et seq. (McKinney Supp. 1986). Although we are not bound to follow New York law, neither should we ignore New York's policy of giving protection to professional journalists. The Shield Law provides that a professional journalist shall not be held in contempt by any court for

> "... refusing or failing to disclose any news or the source of any such news coming into his possession *in the course of gathering or obtaining news for publication* ... by which he is professionally employed or associated *in a newsgathering capacity* ...." (emphasis added).

N.Y. Civ. Rights Law § 79-h(b).

Thus, in order successfully to raise a claim of privilege under the New York Shield Law, a professional journalist must have obtained the information in the course of gathering news for publication. In *People* v. *LeGrand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (2d Dep't 1979), an author of a book was denied the protection of the Shield Law because the court found that he was not a "professional journalist" within the meaning of the statute. The court compared the characteristics of a professional journalist with those of the author before it and concluded that the statute's protections should not be expanded to protect the author. The court, however, did not rule out the possibility that, under different circumstances, the protections of the Shield Law could be invoked by an author: "The court defers comment at this time with respect to some future situation in which an author's role would be clearly that of an *investigative journalist* whose work product will be published in book form." *Id.* at 258 (emphasis added).

The underlying policies served by the New York Shield Law and federal law are congruent. Both "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment, *see e.g., New York Times* v. *Sullivan*, 376 U.S. 254 (parallel citations omitted) (1964)." *Baker* v. *F & F Investment*, *supra*, 470 F.2d at 782.

B.

"It is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship." *In re Grand Jury Subpoena Dtd. January 4, 1984*, 750

F.2d 223, 224 (2 Cir. 1984). Based on our analysis set forth above, we distill the essential characteristics of one entitled to invoke the journalist's privilege. We hold that the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material—sought, gathered or received—to disseminate information to the public and that such intent existed at the inception of the newsgathering process. This requires an intent-based factual inquiry to be made by the district court.

The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

Although prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination, it is not the sine qua non. The burden indeed may be sustained by one who is a novice in the field.

Further, the protection from disclosure may be sought by one not traditionally associated with the institutionalized press because "[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 705. It is beyond peradventure that "[l]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Id.* at 704.

The primary relationship between the one seeking to invoke the privilege and his sources must have as its basis

the intent to disseminate the information to the public garnered from that relationship. To this end, the source may be confidential or nonconfidential.

C.

This brings us to the disposition of Reynolds' claim to the journalist's privilege in the case before us. As stated above, the burden was on Reynolds to establish that she had those characteristics which we have delineated as the essential attributes of a journalist. She failed to sustain her burden.

We consider, first, her claim that she is a journalist for the purpose of resisting compelled production of the investigative reports commissioned by Reynolds on the lifestyles of Martha von Bulow's children. In her letter of August 6 to the district court Reynolds stated that she had ordered the reports because the children's "credibility was something I had to establish not only for the [von Bulow criminal] case, but also for my own peace of mind." At oral argument before us Reynolds' counsel conceded that, when Reynolds commissioned the reports, "her primary concern was vindicating Claus von Bulow." There is no dispute, therefore, that, at the time she directed that the information be gathered, Reynolds did not intend to use the reports to disseminate information to the public. We hold that the reports are discoverable. Fed. R. Civ. P. 26(b)(1).

Turning next to the notes taken by Reynolds while watching the von Bulow trial on television, it is anomalous that Reynolds first characterizes these notes as "[w]orthless doodles" and then seeks to have this court robe them in the protective garb of the First Amendment. We decline to do so. Although Reynolds belatedly asserts

that the notes were taken because of an agreement with the *Post*, this assertion is belied by the fact that Reynolds continued to make the notes even after negotiations with the *Post* proved to be fruitless. The district court was unable to find that Reynolds was engaged in any meaningful way in the gathering and dissemination of news while she attended von Bulow's criminal trial. The record supports this finding. We hold that the notes are discoverable. Fed. R. Civ. P. 26(b)(1).

Finally, we turn to the manuscript itself. Reynolds resists production of her manuscript on the ground that the author of such a manuscript, under a contract for publication, is protected automatically by the journalist's privilege. Her argument seeks to prove too much. We have held above that the talisman invoking the journalist's privilege is intent to disseminate to the public at the time the gathering of information commences. Reynolds has not demonstrated this intent through competent evidence. Her letter to the district court dated August 6 stated that, with two exceptions, her book was based on material in the public domain. The two exceptions were "my memories and an investigative report I had ordered about [Martha von Bulow's children's] lifestyles." We have held that the investigative reports commissioned by Reynolds in and of themselves are not privileged. It is elementary that otherwise discoverable documents may not be converted into protected documents by taking some subsequent action with respect to them. *Fisher* v. *United States*, 425 U.S. 391 (1976). An individual's "memories" are not privileged by virtue of the First Amendment merely because, at a later date, those memories are committed to writing.

To the extent that Reynolds claims that production of the manuscript may not be compelled because it is based on sources who spoke to her under agreements of confidentiality, the force of that claim is undermined by her deposition testimony where she stated that her relationship with her confidential sources "stemmed from before I was writing the book". She testified:

> "There were some people that I heard before the trial who said, 'You can divulge whatever you want to divulge to the lawyers of Mr. von Bulow.' You can imagine that in a trial of the magnitude of Mr. von Bulow's, I was beseiged with people who said they wanted to impart information, and they thought I would be the ideal recipient, not that I thought that they were right, necessarily."

Reynolds simply has not made the requisite showing that assurances of confidentiality were given by her out of journalistic necessity. *In re Grand Jury Subpoena Dtd. January 4, 1984, supra,* 750 F.2d at 225. Her testimony is equally consistent with acquiring confidential sources for reasons other than intent to disseminate edited versions of the information gathered.

Thus, our central inquiry as to whether Reynolds is entitled to claim a journalist's privilege must be answered in the negative. Since Reynolds gathered information initially for purposes other than to disseminate information to the public, we decline to serve as a judicial seamstress to alter the protective cloak of the First Amendment in order that it fit her now.

III.

We come now to Reynolds' claim that production of the documents is protected by the shield of an attorney-client

privilege. She argues that, based upon work she performed as a "paralegal" on the von Bulow criminal defense team in connection with the Rhode Island state criminal proceedings, she should not be required to comply with the production order. The district court rejected that claim. We agree.

Again, Reynolds asks us to construe expansively a privilege, in contravention of the search for truth, on the most meager of records. The law is clear in this circuit that a person claiming the attorney-client privilege has the burden of establishing all the essential elements thereof. *In re Horowitz*, 482 F.2d 72 (2 Cir.), *cert. denied*, 414 U.S. 867 (1973). "That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *In re Bonanno*, 344 F.2d 830, 833 (2 Cir. 1965). We agree with the district court that her claim of an attorney-client privilege lacks the required factual support.

The attorney-client privilege is founded on the assumption that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively. *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). We have recognized that an attorney's effectiveness depends upon his ability to rely on the assistance of various aides, be they "secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." *United States* v. *Kovel*, 296 F.2d 918, 921 (2 Cir. 1961). "[T]he privilege must include all the persons who act as the attorney's agents." 8 Wigmore, Evidence § 2301 (McNaughton rev. 1961), (quoted in *United States* v. *Kovel, supra*, 296 F.2d at 921). The ques-

tion is a simple one. Was Reynolds an agent of an attorney and has she presented sufficient evidence of this relationship? In other words, were communications made to her, in confidence, in her capacity as an agent of an attorney for the purpose of obtaining legal advice from that attorney? *United States* v. *Kovel, supra,* 296 F.2d at 922 ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal advice from the lawyer.*") (emphasis in original). We think not. Rather, instead of competent evidence, Reynolds makes blanket assertions seeking to invoke an attorney-client privilege. She has not given the name of any attorney for whom she served as agent. A letter from a von Bulow attorney merely acknowledges that she attended legal strategy and planning sessions for the criminal case, but does not explicate any professional reasons for her attendance.

As for the subpoenaed documents themselves, Reynolds informed the district court in her letter of August 6 of her personal reasons for commissioning the investigative reports. With regard to the notes taken while she watched the criminal trial on television, Reynolds testified in her deposition that the had "stopped working as a paralegal when the trial started." She therefore cannot claim now that she was acting as the agent of an attorney in taking the notes. Finally, we decline Reynolds' invitation to extend the attorney-client privilege to a manuscript which she *intends* to publish. To accept such an invitation would serve poorly the teaching that "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion of [the] privilege[ ]." 8 Wigmore, Evidence § 2192, at 73 (McNaughton rev. 1961) (*quoted in United States* v. *Kovel, supra,* 296 F.2d at 921).

## IV.

To summarize:

We affirm the orders of the district court which directed Reynolds to produce the subpoenaed documents under an order of confidentiality and which held her in civil contempt of court for failing to do so. We hold that an individual claiming the journalist's privilege must demonstrate, through competent evidence, the intent to use material sought to disseminate information to the public and that such intent existed at the inception of the newsgathering process. Reynolds having failed to sustain that burden, we refuse to accord the journalist's privilege to her. We also hold that the subpoenaed documents are not shielded from production by the attorney-client privilege. Reynolds was not acting as an agent of an attorney when she gathered the information contained in the documents.

These being expedited appeals, we order that the mandate issue ten (10) days from the date of the filing of this opinion to enable appellant, if she is so advised, to apply to the Supreme Court of the United States for a further stay of the issuance of the mandate pending the filing of a petition for a writ of certiorari. If such further stay is granted by the Supreme Court and if appellant files a timely petition for a writ of certiorari, then further proceedings shall be governed by Fed. R. App. P. 41(b). Otherwise, the mandate shall issue ten (10) days from the date of the filing of this opinion.

Affirmed.

## Contempt Order of Walker, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 5553 (JMW)

MARTHA VON BULOW,

*Plaintiff,*

*vs.*

CLAUS VON BULOW,

*Defendant.*

New York, New York
November 18, 1986—1:30 p.m.

Before:

HON. JOHN M. WALKER, JR.,
*U.S. District Judge*

Appearances:

BARRETT SMITH SCHAPIRO SIMON & ARMSTRONG,
*Attorneys for Plaintiff*
By: FREDERIC W. PARNON,
IVAN KLINE, *Of Counsel*

LANKLER SIFFERT & WOHL,
*Attorneys for Andrea Reynolds*
By: JOHN S. SIFFERT, *of Counsel*

* * *

The Court: The parties in this matter have come before me following our most recent hearing that we have held and, specifically, they are concerned with the matter of production of the Andrea Reynolds material.

There are two groups of materials, one group has been furnished to the Court and the Court is holding it in camera, and the other consists of a manuscript that was prepared by Miss Reynolds that is in her possession at this particular time.

The Court has directed that all these materials be furnished to the plaintiff. However, Miss Reynolds has expressed her view to her attorney, Mr. Siffert, that she wishes to appeal the Court's ruling of directing the production of these materials.

Accordingly, the Court is not turning over the materials that are held in camera pending a final determination of this matter by the Court of Appeals, and similarly, there is a question as to whether the manuscript ruling is ripe for appeal, given the fact that there has been no final order with regard to that.

So in that regard, the Court now holds Miss Reynolds in contempt and fines her $500 a day as long as she is in contempt. The Court will stay the imposition of that fine pending a final determination by the Court of Appeals.

There is currently a stay in effect with regard to the production of these materials for a period of seven days, which is scheduled to expire when?

Mr. Siffert: The end of the day today or middle of the day tomorrow.

The Court: The Court will extend that stay pending the determination of this issue in the Court of Appeals.

Mr. Parnon: May I clarify one or two points.

We have been up to the Second Circuit's counsel office and Mr. Siffert and I have agreed that the appeal will be expedited, and I understand that your Honor's ruling to stay the contempt is based upon a representation that it will be expedited?

The Court: That's correct. It is based on a representation by Mr. Siffert that the appeal from the contempt citation will be expedited and presumably consolidated with the appeal on the materials turned over in camera.

Mr. Parnon: Yes, your Honor.

The Court: Also would you state on the record, Mr. Siffert, what the appellate schedule is.

Mr. Siffert: The appellate schedule is that the record was due on December 3. The brief and joint appendix of Miss Reynolds is December 4, and reply brief is December 11, the argument will be the week of the 15th of December, but probably toward the end of the week, the 18th or the 19th.

What I will do is I will ask the reporter for daily copy of this and treat this as the final order and file our notice of appeal from this order, as well as the confidentiality order which your Honor signed in the interim and immediately ask that all three be consolidated.

Mr. Parnon: Off the record a second.

(Discussion off the record)

* * *

## Confidentiality Order of Walker, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 5553 (JMW)

MARTHA VON BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

*Plaintiff,*

*against*

CLAUS VON BULOW,

*Defendant.*

In accordance with this Court's opinion of October 14, 1986, it is hereby:

ORDERED that the documents submitted by Andrea Reynolds to this Court for inspection *in camera* and a copy of the manuscript of her book (collectively referred to herein as the "Confidential Documents") shall be delivered immediately to plaintiff's counsel on the following terms and conditions:

1. All Confidential Documents produced to plaintiff's counsel pursuant to this Order shall be held in strictest confidence by plaintiff's counsel and by plaintiffs' next friends and shall be made available only to plaintiff's attorneys and to Alexander Auersperg and Annie Laurie Auersperg

Kneissl, plaintiff's next friends in this litigation. All Confidential Documents shall be kept and shall remain in the offices of plaintiff's attorneys (along with all copies thereof) except as necessary for use by plaintiff's attorneys during depositions or at trial.

2. Confidential Documents shall be used solely for the purpose of prosecuting this action (or any actions consolidated with this action) and not for any other purpose whatsoever.

3. In the event that plaintiff's attorneys desire to file papers referring to any Confidential Documents, they shall file such papers or portions of papers under seal, until further Order of Court. In the event that plaintiff's attorneys desire to use Confidential Documents in discovery proceedings, they shall arrange for all portions of such proceedings containing references to Confidential Documents to be sealed. In the event that plaintiff's attorneys desire to use Confidential Documents in proceedings before the Court, they shall apply to the Court for an order protecting the confidentiality of these documents.

4. At the conclusion of this litigation, all Confidential Documents (and all copies thereof) shall be returned promptly to Andrea Reynolds.

5. Nothing contained herein shall prohibit Andrea Reynolds from seeking such further protections or relief as she may deem necessary and desirable regarding the use of Confidential Documents.

Dated: New York, New York
October 21, 1986

/s/ JOHN M. WALKER, JR.

Honorable JOHN M. WALKER, JR.
United States District Judge

## Opinion of Walker, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 5553 (JMW)

MARTHA VON BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

*Plaintiff,*

*against*

CLAUS VON BULOW,

*Defendant.*

WALKER, District Judge:

### STATEMENT OF FACTS

Plaintiffs have brought the instant action on behalf of Martha von Bulow, alleging, *inter alia,* that Defendant Claus von Bulow placed his wife into her current state of a permanent coma by surreptitiously injecting her with insulin and other drugs. Plaintiffs' complaint alleges claims sounding in common law tort, common law fraud, and the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO").

Plaintiffs seek to compel discovery from Andrea Reynolds ("Reynolds"), a close acquaintance of Defendant Claus von Bulow and his steady companion during Rhode Island state criminal proceedings which resulted in his

acquittal on charges of assault with intent to murder his wife. Specifically, plaintiffs seek a current draft of a book Reynolds is preparing on defendant's Rhode Island criminal trial, together with related notes submitted to this Court *in camera*. Reynolds, appearing *pro se*, has refused to comply with these discovery requests. She contends that the materials sought by plaintiffs are protected from discovery by the journalist's privilege. For the reasons set forth, this Court concludes that the privilege is not applicable and directs production of the materials in question.

## DISCUSSION

### *Journalist's Privilege*

A journalist's privilege is recognized in the Second Circuit.[1] *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). Other circuits have also recognized this privilege. *See, e.g., Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981); *United States* v. *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

Plaintiffs do not challenge the existence of this privilege;[2] rather they contend that Reynolds has not made a

1. Where a federal court's jurisdiction arises both out of diversity and the presence of a federal claim, federal case law applies to any claim of privilege. *See Wm. T. Thompson Co.* v. *General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982); *Perrignon* v. *Bergen Brunswig Corp.*, 77 F.R.D. 455, 458 (N.D. Cal. 1978).

2. The journalist's privilege is of a qualified nature, and a court may order disclosure "upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir.), *cert.*

*(footnote continued on next page)*

sufficient showing that she is in the class of persons entitled to invoke the privilege. In other words, plaintiffs argue that Reynolds is not a "journalist." For the reasons set forth, this Court agrees.

"[W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving and any exceptions which exist are distinctly exceptional. . . ." 8 Wigmore or Evidence § 2192, at 70 (McNaughton ed. 1961). Moreover, "[e]videntiary privileges in litigation are not favored and even those rooted in the Constitution must give way in proper circumstances." *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979); *accord In re Horowitz*, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

Is it true that "[l]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods" *Branzburg* v. *Hayes*, 408 U.S. 665, 704 (1972); however, not every potential witness may seek to avoid discovery by invoking the reporter's privilege. Unjustified assertions of the reporter's privilege impede the administration of justice without advancing any first amendment interests.

The broad definitional approach suggested in *Branzburg* has received little elaboration in the federal courts. However, in *Gravel* v. *United States*, 408 U.S. 606 (1971), handed down the same day as *Branzburg*, the Court rejected the proposition that an individual not actively involved in the

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*denied*, 464 U.S. 816 (1983); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982), *cert. denied*, 459 U.S. 909 (1982). Since this Court finds that Reynolds does not fall within that group of potential witnesses who may invoke the reporter's privilege, any questions concerning the materiality and availability of the materials she seeks to protect need not be reached.

dissemination of topical information may withhold otherwise discoverable material. In *Gravel*, an aide to United States Senator Mike Gravel sought to quash a grand jury subpoena relating to the possibly criminal release of classified materials on the Vietnam War, which eventually became known as the "Pentagon Papers." Although the opinion in *Gravel* focused primarily on the holding that the speech and debate clause of the United States Constitution, Article I, § 6, did not provide a basis for quashing the subpoena, the Court also held that the aide could not refuse to provide otherwise discoverable material by invoking the journalist's privilege or any similar privilege. *Id.* at 627. Of particular relevance to the instant case, the Court found that work by the Senator and his aide on an upcoming book concerning the Pentagon Papers did not provide a basis for quashing the subpoena. *See id.* at 622-27.

Federal cases allowing a potential witness to invoke the journalist's privilege have premised its availability upon some involvement of the witness in activities commonly associated with the gathering and dissemination of current or topical information in a timely fashion. Thus, cases have upheld assertions of privilege by persons, even though not regularly employed by a recognized news agency, if they were actively engaged in the reporting and editing of newsworthy information. For example, in *United States* v. *Burke*, 700 F.2d 70, 76-78 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983), the Court of Appeals held that a participant in a gambling fraud scheme who subsequently published an article on his illegal activities could properly invoke the journalist's privilege. Similarly, the Court of Appeals held that the journalist's privilege prevented discovery of confidential sources from a Columbia Journalism Review editor who had used those sources to write a *Saturday*

*Evening Post* article on blockbusting. *Baker* v. *F & F Investment*, 470 F.2d 778, 780-81 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *See also Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 84-85 (E.D.N.Y. 1975) (upholding assertion of privilege by the chief executive officer of *The Medical Letter on Drugs and Therapeutics*, a technical journal with a circulation of 70,000 readers).

Although relatively few federal cases have attempted to delineate those individuals qualified to invoke the journalist's privilege, a number of states have formulated such definitions in "shield laws" which protect reporters from discovery. As of 1980, some 26 states had enacted such shield laws. Comment, *The Newsman's Qualified Privilege: An Analytical Approach*, 16 Cal. W.L. Rev. 331, 368 n.284 (1980). Since it is appropriate that federal courts refer to relevant state law in developing federal rules of privilege, *Inmates of Unit 14* v. *Rebideau*, 102 F.R.D. 122, 127 (N.D.N.Y. 1984); *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), this Court takes note of the definitions of those grouped as journalists under state shield statutes.

State legislatures typically have protected the confidential information possessed by individuals who are engaged in the gathering and dissemination of news. For example, the New York shield law allows invocation of a journalist's privilege by any individual "engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency" or "analyzing, commenting on or broadcasting, news by radio or television transmission." N.Y. Civ. Rights Law § 79-h(6), h(7) (McKinney Supp. 1986). California provides its journalist's privilege to those individuals who serve as "[a] publisher, editor, reporter, or

other person connected with or employed upon a newspaper, magazine, other periodical publication, or by a press association or wire service. . . ." Cal. Evid. Code § 1070 (West Supp. 1986). In New Jersey, this privilege may be invoked by "a person engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public. . . ." 2A N.J. Stat. Ann. § 84A-21 (West Supp. 1985). These definitions in state shield laws provide support for this Court's conclusion that for protection under the journalist's privilege to be available to a witness that witness must be actively involved in the gathering and dissemination of news.

The burden is on Reynolds to show the applicability of the journalists privilege since "[i]t is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are essential elements of the privileged relationship. . . ." *In re Grand Jury Subpeona*, 750 F.2d 223, 224 (2d Cir. 1984); *accord United States* v. *Stern*, 511 F.2d 1364, 1367 (2d Cir.), *cert. denied*, 423 U.S. 829 (1975). Reynolds has not met this burden.

Viewed in the context of existing statutory and decisional authority, Reynolds' claim that the documents in question are privileged because of her status as a journalist falls short of the mark. Reynolds rests her claim of privilege on two grounds. First, Reynolds claims that she recently published a single article that appeared in the German magazine *Stern*. Second, she states that the New York Post newspaper issued a press pass to her during the defendant's criminal proceedings. However, the *Stern* article identifies Reynolds' husband, Sheldon Reynolds, rather than Reynolds herself as the author, and Reynolds admits that the Post never published any article that she wrote.

Based on these facts, this Court is unable to conclude that Reynolds was engaged in any meaningful way in the gathering and dissemination of news while she attended von Bulow's criminal trial. Further, she has not demonstrated that the notes and book manuscript sought by plaintiffs are related to any purported journalistic activities, whether for *Stern* magazine, the New York Post or any other publication other than a possible book of her own.

The facts of the instant case are strikingly similar to those found insufficient by a New York state appellate court to justify a journalist's privilege claim. In *People* v. *Le Grand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (2d Dep't 1979), the privilege claimant had attended several criminal trials and, like Reynolds, had planned to author a book about the group of defendants involved in those trials. In denying the author's invocation of the journalist's privilege, an appellate division panel wrote that New York's statutory provisions "evince a clear legislative design to benefit 'professional journalists' and 'newscasters' only. They should not by judicial fiat and strained interpretation be deemed to encompass those engaged in a different field of writing and research." *Id.* at 451, 415 N.Y.S.2d at 255. *See also Gravel* v. *United States*, 408 U.S. 606 (1971); *In re Grand Jury Subpeona*, 750 F.2d 223, 225 (2d Cir. 1984) (denying invocation of a "scholar's privilege" based on an incomplete Ph.D. thesis because the claimant had failed to make a "threshold showing consisting of a detailed description of the nature and seriousness of the scholarly work in question . . .")

These considerations compel this Court to deny Reynolds' claim of a journalist's privilege.

*Confidentiality of Reynolds' Materials*

Plaintiffs have represented to this Court that they will "submit a proposed order governing the confidentiality of the above documents." Accordingly, this Court directs plaintiffs and Reynolds to submit an appropriate stipulation or to settle a form of order within seven days of the date of this memorandum providing for appropriate confidentiality and limiting disclosure to the plaintiffs' attorneys and their "next friend" clients solely for the purpose of this litigation. The documents shall remain in the offices of plaintiffs' attorneys and neither the documents nor any copies may be removed therefrom except for use by plaintiffs' attorneys during depositions or at trial. At the conclusion of the litigation, all copies are to be returned promptly to Reynolds. Upon this Court's endorsement of the stipulation or order protecting confidentiality, the *in camera* materials will be turned over to plaintiffs and Reynolds is directed to provide plaintiffs with a copy of her manuscript.

CONCLUSION

Plaintiffs' motion to compel discovery is granted.

So Ordered.

Dated: New York, New York
October 14, 1986

/s/ John M. Walker, Jr.

Honorable John M. Walker, Jr.
United States District Judge

# Appendix B

## Statutes

### 28 U.S.C. § 1332

***Diversity of Citizenship; amount in controversy; costs***

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(1982)

## 18 U.S.C. § 1964

### *Civil Remedies*

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(1982 & Supp. III 1985)

**N.Y. Civ. Rights Law § 79-h**

***Special provisions relating to persons employed by, or connected with, news media***

(a) Definitions. As used in this section, the following definitions shall apply:

(1) "Newspaper" shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter.

(2) "Magazine" shall mean a publication containing news which is published and distributed periodically, and has done so for at least one year, has a paid circulation and has been entered at United States post-office as second-class matter.

(3) "News agency" shall mean a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

(4) "Press association" shall mean an association of newspapers and/or magazines formed to gather and distribute news to its members.

(5) "Wire service" shall mean a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

(6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, mag-

azine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

(7) "Newscaster" shall mean a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission.

(8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine,

or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which he is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to him.

(c) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.

(d) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.

(e) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.

(McKinney 1976 and Supp. 1987)

## Cal. Evid. Code § 1070

***Newsmen's Refusal to disclose a news source***

(a) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(b) Nor can a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

(c) As used in this section, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not re-

lated information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

(West Supp. 1987)

**N.J. Stat. Ann. § 2A:84A-21**

***Newspaperman's privilege***

Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

(West Supp. 1986-1987)

FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1361

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

ANDREA REYNOLDS,

*Petitioner*,

—against—

MARTHA von BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

*Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

In holding that petitioner Andrea Reynolds was not entitled to withhold documents from discovery on the basis of the First Amendment qualified journalist's privilege, the District Court relied on Ms. Reynolds' deposition testimony, her letter to the Court dated August 6, 1986, and other evidence submitted by the parties. After reviewing this evidence, the Second Circuit unanimously adopted the lower court's factual finding that Ms. Reynolds was not "involved actively in the gathering and dissemination of news" and held that Ms. Reynolds had failed to meet her burden of showing that she had the "essential attributes of a journalist."

In view of the factual record of this case the questions sought to be presented by petitioner should be restated:

1. Whether a witness who is not a journalist by trade may be required to make a threshold showing that she is within the class protected by the qualified journalist's privilege before the court will apply the First Amendment balancing test required by the privilege.

2. Whether an intimate friend of a defendant, who has gathered information to aid the defendant in prior proceedings rather than to disseminate it to the public, and who later decides to author a book using that information plus her own memories, is entitled to invoke the First Amendment qualified journalist's privilege to prevent discovery of the manuscript of the book in a civil lawsuit against that defendant.

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*Respondent*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Martha von Bulow, by her next friends, Alexander Auersperg and Annie Laurie Auersperg Kneissl, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case.

## OPINIONS BELOW

The lower court opinions issued between October 14, 1986 and February 10, 1987 are listed in the Petition at page 2 and reprinted at Appendix A. On February 20, 1987 petitioner's Motion for a Stay of the Mandate of the Court of Appeals for the Second Circuit was denied by Justice Thurgood Marshall. On February 23, 1987, subsequent to the filing of the Petition, the District Court issued an oral decision from the bench denying petitioner's application for a stay or other relief from the District Court's previous orders, refusing to supplement the record by receiving additional documents from Ms. Reynolds, and directing petitioner to comply with its orders by 5:00 P.M. on February 24, 1987. A transcript of the decision is reprinted in Respondent's Appendix A at 47a.

## JURISDICTION

Respondent concurs in the statement of this Court's jurisdiction found at page 2 of the Petition insofar as it applies to petitioner's manuscript. However, since the District Court has given respondent the documents that Ms. Reynolds had submitted *in camera* (her handwritten notes and two investigative reports), the Petition is moot with respect to those documents.

## COUNTER-STATEMENT OF THE CASE

This is an action seeking damages and other relief against defendant Claus von Bulow, based on allegations that he twice attempted to murder his wife, Martha von Bulow, and to defraud her. Petitioner Andrea Reynolds, Claus von Bulow's constant companion during the appeal of his conviction for attempted murder and his retrial, is an important witness in this case. Plaintiff subpoenaed her as a non-party witness seeking her testimony and production of relevant documents. Ms. Reynolds refused to pro-

duce three categories of documents: two investigative reports that she commissioned prior to von Bulow's retrial; handwritten notes that she took while watching the retrial; and the manuscript of a book that she is preparing about the von Bulow case.

Since the documents in the first two categories have been turned over to respondent, only the manuscript is still at issue. In a letter to the district court dated August 6, 1986 Ms. Reynolds did not suggest that this manuscript was based on information acquired by her through investigation or research but instead admitted that it "was almost entirely based on material in the public domain" as well as "my memories" and an investigative report (since produced to respondent) she had commissioned for her "own peace of mind." (JA 108).

**Procedural History**

The subpoena was served on Ms. Reynolds on June 2, 1986. She ignored the subpoena and follow-up letters for two months, until plaintiff moved to have her held in contempt. Ms. Reynolds then responded in a letter to the court dated August 6 and submitted the two investigative reports and her notes for *in camera* review. After respondent submitted a short Memorandum of Law noting that Ms. Reynolds did not claim to have produced any of the documents as a journalist (JA 113), Ms. Reynolds for the first time asserted in oral argument that her documents were protected by a journalist's privilege. The District Court then gave her the opportunity to create a record through deposition testimony to support her claim. (JA 147-177). Ms. Reynolds appeared for her deposition but refused to answer questions about the contents of her manuscript, asserting that the subject of the deposition was to be narrowly limited to her claimed background as a journalist.

After reviewing the deposition and other evidence submitted by the litigants, the District Court ruled on October 14, 1986 that the documents sought were not protected by a journalist's

privilege and ordered Ms. Reynolds to produce them. The District Court also rejected Ms. Reynolds' belated argument that the attorney-client privilege protected the documents. Subsequently, the Court's Confidentiality Order restricting the use of the documents was entered on October 28, 1986 and Ms. Reynolds was held in contempt on November 18, 1986 for her failure to produce the manuscript. Ms. Reynolds appealed from the Contempt Order and the underlying production orders.

On February 10, 1987, the Second Circuit affirmed the orders appealed from in all respects and ordered that its mandate issue ten days from the date of the filing of the opinion, unless Ms. Reynolds obtained a stay of the mandate from the Supreme Court within that time. The Second Circuit subsequently denied Ms. Reynold's application for a stay and for reconsideration. Justice Thurgood Marshall denied Ms. Reynolds application for a stay on February 20, 1987. On February 23, 1987, the Second Circuit's mandate having issued, the District Court turned over to respondent the documents that it had been holding *in camera* and ordered Ms. Reynolds to produce the remaining document, her manuscript, by 5:00 P.M. on February 24, 1987. Ms. Reynolds has not complied with this order and continues to be in contempt of court.

**Statement of Essential Facts**

The facts set forth in Ms. Reynolds' Petition and Application for Stay of Mandate are selectively chosen, and in significant part consist of statements made by Ms. Reynolds at her deposition that were not credited by the District Court or the Second Circuit. Meanwhile, no mention is made by Ms. Reynolds of various admissions at her deposition and in her papers that were credited by the courts below, and that undercut Ms. Reynolds' claim that she was acting as a journalist. A recitation of the relevant facts is provided in the Second Circuit's

opinion reprinted at Petition 1a-24a. This brief merely notes certain misstatements and omissions in Ms. Reynolds' Petition.

Most notably, Ms. Reynolds inaccurately attempts to portray herself as having been hired by the *New York Post* to cover the criminal trial and states that she "wrote several articles which were found to be suitable for publication." (Pet. 6; *see also* Pet. 11, referring to this as an "undisputed" fact). In fact, a former editor of the *Post*, in a letter written for Ms. Reynolds, simply stated that Ms. Reynolds had provided "samples" of her writing which were good (JA 402-403). Moreover, the Second Circuit, after noting that Ms. Reynolds had stated during her deposition that "negotiations with the *Post* had never come to fruition," (Pet. 7a), endorsed the District Court's finding that Ms. Reynolds was not "engaged in any meaningful way in the gathering and dissemination of news while she attended von Bulow's criminal trial" in 1985. (Pet. 20a).

Ms. Reynolds also states as "uncontradicted facts" that she "had intended to 'write about the von Bulow affair as a reporter' since 1983 and that she had taken notes at the second criminal trial for that purpose." (Pet. 9). However, the only mention on any of the pages cited by Ms. Reynolds of why she took the notes at the trial is an oblique reference to her arrangement with the *New York Post* (JA 158-59). Yet, as the Second Circuit specifically found, she continued to take the notes "even after the negotiations with the *Post* proved to be fruitless." (Pet. 20a). Thus, the District Court found, and the Second Circuit agreed, that the notes she took during the second trial were not related to any journalistic activity. (Pet. 36a, 20a).

Finally, Ms. Reynolds includes in her papers (Pet. 5, n.2) a reference to a "letter agreement with Mr. von Bulow" that is mentioned nowhere in the record, or in the opinions below, and for which no citation to the record is supplied. After the Second Circuit's mandate issued, Ms. Reynolds attempted to supplement the record with four documents, which apparently

included the one referred to in the Petition. (Appendix A at 49a). Judge Walker rejected Ms. Reynolds belated attempt to supplement the record and noted that, in any event, the documents appeared to have "no bearing" on the issue of a journalist's privilege. (Appendix A at 49a). The reference should be ignored.

## REASONS TO DENY THE WRIT

This case does not meet any of the criteria for granting certiorari set forth in Rule 17 of the Supreme Court Rules and Ms. Reynolds has not shown any other "special and important reasons" for granting review.

### A. The Decision Below Is So Narrowly Fact-based and Limited in Application That It Does Not Raise an Important Question of Federal Law

The dispositive question in this case is whether a defendant's friend who gathers information to help the defendant and who later decides to write a book based on such information and on her personal experiences may then invoke the First Amendment to shield the production of the manuscript of the book in litigation against the defendant. Plaintiff submits that the narrow, fact-specific issue raised by this case need not be considered or addressed by the Supreme Court.

The decisions of the courts below properly focused on the unique facts of this case. Ms. Reynolds indisputably has been privy to much information concerning defendant Claus von Bulow's actions that are relevant to plaintiff's lawsuit, and she has obtained such information not because of her alleged journalistic activities but simply because she has been von Bulow's constant companion. Ms. Reynolds is admittedly not a journalist by trade and the District Court and the Second Circuit noted that even the one magazine article she claimed to have published identified her husband as the author. (Pet. 7a, 35a).

Her manuscript, as noted by the Second Circuit, relying on Ms. Reynolds' own letter to the District Court, "was based on material in the public domain," on Ms. Reynolds' "memories," and on two investigative reports. (Pet. at 20a). These investigative reports have already been turned over to respondent pursuant to the District Court's orders. To the extent that Ms. Reynolds claims to have also used information she obtained from other persons, the Second Circuit, relying on Ms. Reynolds' deposition testimony, found that these persons came to her because of her relationship with von Bulow, and prior to her decision to write a book (Pet. 21a). In short, there has been no showing that any of the information in the manuscript was gathered or otherwise obtained by Ms. Reynolds as part of any effort to disseminate information to the public, whether through a book or through any other form of journalism.

While Ms. Reynolds attempts to portray the Second Circuit's decision below as an attack on First Amendment protections, the Second Circuit in fact did not deny authors of non-fiction books the right to assert a journalist's privilege, nor did it formulate a new test for application of the privilege that will have a chilling effect on such authors or other journalists. Instead, the Second Circuit derived a test to apply to these unique facts based on precedents established by this Court and by the federal Courts of Appeals. The Court recognized a broad journalist's privilege available to any person involved in the gathering and dissemination of news and extending to both confidential and non-confidential sources, as well as resource materials (Pet. 12a). Under this test the claimant of a privilege must merely make a preliminary showing that he gathered or obtained information with the intent to disseminate it to the public. This result creates no threat of "chilling" amateur or professional journalists who engage in bona fide newsgathering or who rely on sources as part of their work for the purpose of disseminating information to the public. It excludes only persons who, like Ms. Reynolds, attempt to shield from discovery their memories of personal experiences and information obtained by virtue of their con-

nection to the case and apart from any newsgathering or other journalistic activity.

Thus, the Second Circuit's interpretation of the scope of the journalist's privilege is a reasonable one and prevents undue expansion of the privilege which would unnecessarily restrict discovery. As this Court has repeatedly admonished in construing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683 (1974), quoted in, *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979).

### B. The Second Circuit's Interpretation of the Scope of the Journalist's Privilege Is Consistent with the Decisions of Other Courts of Appeals and of This Court

The Second Circuit's decision is in no way inconsistent with the decisions of the Second Circuit and of other federal Courts of Appeals that are cited by Ms. Reynolds at Petition 13-14.* Those decisions set forth the balancing test to be applied once it has been established that a witness is entitled to the protection of the journalist's privilege. Of the decisions cited, only *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) addresses the issue of who is entitled to invoke the privilege. The reasoning of the *Silkwood* court was quoted and underscored by the Second Circuit as follows:

> "[The film maker's] mission in this case was to carry out *investigative reporting for use in the preparation of a documentary film*. He is shown to have spent considerable

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* Ms. Reynolds' suggestion at Petition 13 and 18 that the Second Circuit's decision in this case conflicts with prior decisions of the Second Circuit and of the Southern District of New York is incorrect, and in any event irrelevant. An intra-circuit conflict ordinarily is not a basis for granting certiorari. Rule 17(1)(a) of the Rules of the Supreme Court of the United States. *See Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

> time and effort in obtaining facts and information of the subject of this lawsuit, but it cannot be disputed that *his intention*, at least, *was to make use of this in preparation of the film*."

(Pet. 15a; emphasis in Second Circuit opinion). Thus, the Second Circuit's decision below, far from being in conflict with *Silkwood*, follows the Tenth Circuit's approach, including its inquiry into the witness' intent in gathering information.

Nor is the decision below inconsistent with the First Amendment decisions of this Court cited by Ms. Reynolds. Ms. Reynolds cites *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) as recognizing the existence of a journalist's privilege protecting individuals engaged in newsgathering. However, plaintiff does not dispute the existence of such a privilege. Furthermore, the Second Circuit clearly recognized in its opinion below the existence of such a privilege (holding simply that Ms. Reynolds could not use that privilege to avoid discovery in this case).

As for the recent decision in *Philadelphia Newspapers, Inc.* v. *Hepps*, ____ U.S. ____, 106 S.Ct. 1558 (1986), it simply has no application here. In that case, the Court held that the burden of proving falsity in private-figure libel cases against media defendants involving speech of public concern must be borne by the plaintiff since requiring the speaker to prove truth "deters such speech because of the fear that liability will unjustifiably result." In this case, the Second Circuit did not burden speech but followed the familiar rule that a witness invoking a testimonial privilege in order to resist giving evidence bears the burden of establishing his entitlement to the privilege claimed. *See e.g.*, *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) (burden on witness claiming journalist's privilege to establish need for preserving confidentiality); *Continental Cablevision* v. *Storer Broadcasting*, 583 F. Supp. 427, 435-6 (E.D. Mo. 1984) (burden on witness claiming journalist's privilege to provide court with "particularized allegations or facts" to support claim). *See also In re Grand Jury Subpoena Dtd. January 4, 1984*, 750

F.2d 223, 224 (2d Cir. 1984) (potential scholar's privilege); *Hodges, Grant & Kaufman* v. *U.S. Government*, 768 F.2d 719, 721 (5th Cir. 1985) (attorney-client privilege); 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2016, p. 126. These decisions are consistent with decisions of this Court. *Cf. United States* v. *Mandujano*, 425 U.S. 564 (1976) (witness invoking Fifth Amendment privilege must satisfy court that claim is not "subterfuge").

The case is also entirely distinguishable from *Herbert* v. *Lando*, 441 U.S. 153 (1979), relied upon by Ms. Reynolds for protection of her alleged "editorial process." The discovery sought in *Lando* was aimed directly at editorial conversations and at conclusions of a journalist in preparing a '60 Minutes' segment in order to prove the conduct and state of mind of the producer in a libel action. *See id.*, at 157 n.2, 171. Here, the manuscript is merely a compilation of unprivileged information obtained by Ms. Reynolds in capacities other than that of a journalist. Moreover, plaintiff is not seeking to inquire into or interfere with Ms. Reynolds' editorial decisions, but instead merely seeks access to the unprivileged information contained in the manuscript. It is difficult to understand how requiring disclosure of this manuscript, particularly under a confidentiality order, would have a chilling effect on the willingness or ability of journalists or other authors to gather material and to disseminate information to the public.

### C. The Court Below Fully Considered and Correctly Decided the Issue

Four judges have carefully reviewed Ms. Reynolds' claim of privilege, and none has found any merit whatsoever in it. Ms. Reynolds has simply failed to show how the discovery ordered here will infringe on any First Amendment interests.

A journalist's privilege has been fashioned from the First Amendment's free speech clause to protect the ability of reporters to gather news for dissemination to the public. *See Branzburg* v. *Hayes*, 408 U.S. 665, 693; *id.*, 408 U.S. at 725,

726 (Stewart, J. dissenting) (journalist's privilege to protect his sources "stems from the broad societal interest in a full and free flow of information to the public [which] underlies the Constitution's protection of a free press"); *United States* v. *Cuthberston*, 630 F.2d 139, 147 (3d Cir. 1980) ("public policy favoring the free flow of information to the public" is the foundation for the journalist's privilege), *cert. denied*, 449 U.S. 1126 (1981). The courts below properly held that none of the information at issue here was obtained for the purpose of disseminating information to the public. Accordingly, the policies underlying the journalist's privilege are not implicated by the discovery granted below and application of the privilege would be unwarranted.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: March 19, 1987

Respectfully submitted,

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# APPENDIX A

## Opinion of the United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 5553

MARTHA VON BULOW,

*Plaintiff*,

—v.—

CLAUS VON BULOW,

*Defendant*.

February 23, 1987
4:10 p.m.

ORAL DECISION

(In open court)

THE COURT: Andrea Reynolds has requested a further conference/hearing before the court today in the wake of developments since the Court of Appeals for the Second Circuit on February 10th, 1987, affirmed in a written opinion the decision of this court holding that Ms. Reynolds was not entitled to a journalist's privilege and would be required to comply with the orders of this court that she turn over the manuscript and other documents as to which she was claiming a privilege.

Stays of the mandate were sought from the Second Circuit Court of Appeals and the United States Supreme Court pending a decision by the Supreme Court on Reynolds' petition for certiorari. Both of those stays were denied. Reynolds now has applied to this court for relief from the orders previously entered by this court and upheld by the Second Circuit Court of Appeals directing compliance with the discovery requests of the plaintiff in this action.

Her claim is that the petition for certiorari will either be mooted if the materials are turned over or, alternatively, that she would have to be in contempt of this court and would suffer the penalties of contempt.

The court denies Reynolds' application for any further stay or relief from the orders of this court concerning the production of the documents in question. The matter has been fully litigated both in this court and the Court of Appeals and a presentation has been made to the Supreme Court for a stay which was denied. Perhaps that is some indication of how the Supreme Court views the petition for certiorari, but that is really not for this court to speculate on. In any event, both the Court of Appeals and Supreme Court have denied a stay of the mandate and this court is not at this point going to alter the state of affairs.

So the third party witness Andrea Reynolds must comply with the orders of this court. And as far as the details of that compliance is concerned, I am going to leave that in abeyance because I want to discuss that with counsel.

I want to briefly turn to the second argument or position that was taken by Andrea Reynolds at this proceeding, and that is that four documents should be received and considered by this court as having some bearing upon the question of whether the journalist privilege should apply in light of the Second Circuit's intent-based inquiry test.

I have reviewed these documents and decline to permit the record to be so supplemented at this late date. First of all, these documents, the court notes, appear to relate to the publication by Von Bulow of a book to be written by him or to the publication of a book about Von Bulow to be written by some third party writer, at least the documents dated 17 April, 1982, and 20 April, 1982, appear to so relate.

Those documents appear to cast Ms. Reynolds in the role of some sort of business intermediary or agent, and hardly bear upon her role as a purported journalist under the Second Circuit test or, for that matter, under any other test that the court can conceive of.

The second two documents, one of which is dated 11 March, 1984, and the other of which is undated, appear to relate to the possibility of a movie being made about the Von Bulow affair in which, again, Andrea Reynolds would possibly be some sort of agent or business associate of Von Bulow's in so arranging. Again, the court sees no bearing on the issue of a journalist's privilege from these documents.

The court's conclusion here is parenthetical because the court declines to permit these documents to supplement the record in any event at this late date. The court's conclusion is buttressed by the fact that Reynolds herself never produced these documents at a time when the question of her being a journalist was precisely at issue at two court appearances before this court or at her deposition.

So it is apparent to this court that, indeed, Ms. Reynolds herself did not consider these documents to have a bearing on the journalist privilege issue. So the court does not see how, even if these documents were admitted, they could assist Ms. Reynolds in any respect.

The court does note, of course, that they were not turned over to the plaintiffs pursuant to their subpoena and were not presented to this court when the court was trying to review with Ms. Reynolds when she was acting pro se the nature of the subpoena that was extant. So the court declines to supplement the record with the four documents presented by counsel but will just mark them as a court exhibit at the present time for purposes of this proceeding.

Now, let me turn now with counsel to the question of compliance here. Mr. Siffert, I think it is time now for Ms. Reynolds to comply, and I am going to, given the fact that you wanted to have the hearing before this court and the efforts that were being made as of last Friday to get a stay from the Supreme Court, I am going to now direct that she comply by close of business tomorrow with the orders of this court, and the penalty of $500 a day will be in effect if she fails to comply.

Of course, the court remains available to plaintiffs in the event of noncompliance to raise the amount of the fine for any such contempt of court. So I would direct that she comply by 5:00 p.m. tomorrow, the 24th of February.

MR. SIFFERT: Just for the record, since we are on the record, I have advised my client that in the event that your Honor denied the stays what the consequences would be of contempt, and as I indicated at the outset, she has told me she would take my advice into consideration, and what she does, I will tell you only that she is going to decide what she decides. I have given her advice, I have made recommendations to her, and I trust that the court understands that I am not the client.

THE COURT: All right.

MR. KLINE: Your Honor, we would like to ask with respect to the other documents that issued, since you are in possession of them and there is no further stay, if it is possible that we could pick them up this afternoon?

THE COURT: Yes.

MR. SIFFERT: With respect to that, I was instructed by my client that if that occurred, to state that if your Honor was going to be turning over the documents that have been held in camera, that Ms. Reynolds' purpose in making sure that they were in camera was to withhold them from plaintiffs, that she does not believe that plaintiffs will respect the confidentiality order. She has instructed me to say this.

Ms. Reynolds has also asked me to request that if the in camera documents are to be produced to the plaintiffs, that the confidentiality order be lifted as to those in camera documents.

THE COURT: She wants the confidentiality order lifted?

MR. SIFFERT: Yes.

THE COURT: Now with respect to those?

MR. SIFFERT: Yes. It is her view. She has instructed me to ask for that.

MR. PARNON: Your Honor, may I speak to that, since Mr. Kline was not involved in the earlier proceedings? What this sounds like is that Ms. Reynolds is considering releasing these documents to the public. We have not seen these documents. As your Honor knows, we were concerned at the early court hearing in August 19th of Ms. Reynolds doing that.

They made the statement to your Honor up at the bench before we started the argument on the record that she had no interest in publicizing these documents and was perfectly willing to abide by your Honor's decision. Your

Honor has decided, and now we hear that she wants to publicize them.

We want very much to oppose any lifting of the confidentiality order. It was made clear on the record that it applied to not just us but Ms. Reynolds.

THE COURT: All right. The confidentiality order will remain in effect, and if she violates that order the court will consider appropriate sanctions for a separate contempt of court.

(Proceedings adjourned)